Petition

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81-483

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1981

THOMAS H. CONKLIN, JR. and JOE D. HOOVER
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September, 1981

QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause of the Fifth Amendment bars a second indictment and second trial of petitioners — on the same evidence — after their first trial ended in a dismissal of the indictment by the District Court because of the failure of the government to prove an essential factual element of the government's case — the existence of venue in the judicial district in which the first indictment was returned?

2. Whether application of the rule that a judicial finding of evidentiary insufficiency in the government's case bars retrial, *Burks* v. *United States*, 437 U.S. 1, turns upon whether the failure of proof relates to a "procedural" or a "substantive" factual element of the government's case?

3. Whether the refusal of the Court of Appeals to apply the principle of *Burks* v. *United States*, 437 U.S. 1, to this appeal because the failure of the government to prove venue was a "procedural" failure of proof offends the Double Jeopardy Clause of the Fifth Amendment? * — **

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* Petitioners appreciate the importance of Rule 21.1(a), requiring that the Questions Presented precede all else in a petition for a writ of certiorari. We respectfully note, however, that in this case the convoluted nature of the proceedings below — in two District Courts in two different judicial districts, and the focus of the Court of Appeals upon the rulings of the District Court whose decision was not presented to it on appeal — causes the summary of events set forth in the Statement of the Case to be unusually important in determining whether the Double Jeopardy Clause questions here presented warrant plenary review, as we submit they clearly do.

** The only party to the proceedings in the Court of Appeals whose name is not contained in the caption of the case is petitioners' former co-defendant, James D. Wilkett. Mr. Wilkett is not a party in this Court because the Court of Appeals held the proceedings against him were barred by the Double Jeopardy Clause of the Fifth Amendment and ordered the indictment dismissed as to him.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	17

CERTIFICATE OF SERVICE follows Petition.

APPENDIX A:

Order of the Court of Appeals Recalling its Mandates and Staying Proceedings Pending Disposition of Petitions for Writ of Certiorari	1a
Opinion of the Court of Appeals	2a
Order of the Court of Appeals Denying Rehearing	18a
Pretrial Order of the District Court for the Eastern District of Oklahoma denying motions to dismiss second indictment against petitioners	19a
Order of the District Court for the Western District of Oklahoma dismissing indictment against petitioners	22a
Order of the District Court for the Western District of Oklahoma denying motions to dismiss indictment	25a

TABLE OF AUTHORITIES

Cases	PAGE(S)
Abney v. *United States*, 431 U.S. 651 (1977)	2, 5
Arizona v. *Washington*, 434 U.S. 497 (1978)	10, 11
Benton v. *Maryland*, 395 U.S. 784 (1969)	15
Burks v. *United States*, 437 U.S. 1	8, 9, 12, 14, 15
Carsey v. *United States*, 129 U.S. App. D.C. 205, 392 F.2d 810 (1967)	10
Crist v. *Bretz*, 437 U.S. 27 (1978)	16
Green v. *United States*, 355 U.S. 184 (1957)	10, 15-16
In Re Winship, 397 U.S. 558 (1970)	9, 12
Jeffers v. *United States*, 432 U.S. 137 (1977)	16
Lee v. *United States*, 432 U.S. 137	15
Meredith v. *Fair*, 298 F.2d 696 (5th Cir. 1962)	15
United States v. *Black Cloud*, 590 F.2d 270	13
United States v. *Budge*, 359 F.2d 732 (7th Cir. 1966)	13
United States v. *Catalano*, 491 F.2d 268 (2d Cir.) *cert. denied*, 419 U.S. 825 (1974)	13
United States v. *Johnson*, 323 U.S. 273 (1944)	12
United States v. *Kampiles*, 609 F.2d 1233 (9th Cir. 1979)	15
United States v. *Martin Linen Supply Company*, 430 U.S. 564 (1977)	12
United States v. *Scott*, 437 U.S. 82 (1978)	7, 11, 12
United States v. *Wilkett*, ... F.2d ..... (10th Cir. 1981)	1

United States Constitution	
Amendment V	2
Amendment VI	2

Statutes	
18 U.S.C. §3731	11
28 U.S.C. §1254(1)	2

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OPINIONS BELOW

The opinion of the Court of Appeals, *United States* v. *Wilkett*, ... F.2d ..... (10th Cir. 1981), not yet officially published, the order of the Court of Appeals withdrawing its mandates and staying further proceedings pending disposition of this petition for a writ of certiorari, the unpublished orders of the District Court for the Western District of Oklahoma and the District Court for the Eastern District of Oklahoma are reprinted as Appendix A hereto.

JURISDICTION

The opinion of the Court of Appeals was filed on June 24, 1981. A timely petition for rehearing or for stay of mandates pending certiorari was denied on July 22, 1981. A motion to recall the mandates and stay further proceedings pending disposition of this petition for a writ of certiorari was granted on August 18, 1981. App. A, pp. 1a-2a. This petition was filed within sixty (60) days from the date of denial of rehearing by the Court of Appeals, and the date the mandates below were recalled. The Court's jurisdiction rests upon 28 U.S.C. §1254(1); *Abney* v. *United States*, 431 U.S. 651, 653 (1977).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

The Sixth Amendment to the Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed."

STATEMENT OF THE CASE

On October 6, 1980, petitioners, both residents of the judicial district of the Eastern District of Oklahoma, were indicted, together with James D. Wilkett, and others, in the Western District of Oklahoma for conspiracy to distribute a controlled narcotic substance in both the Eastern and Western Districts of Oklahoma.

Immediately after the return of the indictment, petitioners moved to dismiss for want of venue in the Western District of Oklahoma.

Alternatively, petitioners sought to require the government to particularize the allegations, setting forth the act(s) it contended could support venue. Petitioners' pre-trial brief fully stated the reasons why venue could not lie in the Western District of Oklahoma. The government responded, in essence, that a conclusory allegation of venue in the indictment was sufficient to force petitioners to trial, and insisted upon doing so. The government asserted that there was "sufficient information in the indictment . . . to permit [petitioners] to plead double jeopardy. . . ."

Well prior to trial, the District Court, although agreeing that no factual allegations appeared which would establish venue, declined to dismiss the indictment against petitioners "at this time", noting that petitioners' venue challenge could be reasserted at the close of the government's evidence. App. A, p. 26a.

Petitioners' trial began on December 8, 1980. On December 11, 1980, after the government had put on its evidence, the District Court requested oral argument on the question whether there was any proof which could sustain venue as to petitioners and allow the case against petitioners to be submitted to the jury. Petitioners argued there was no such evidence and moved for severance, judgments of acquittal or for dismissal of the indictment. The District Court severed petitioners from the trial for failure of the government to introduce any proof of venue and took under advisement petitioners' two remaining motions.

The trial proceeded as to the remaining defendants, including Mr. Wilkett. The remaining defendants were found guilty.

On December 17, 1980, the District Court dismissed the indictment against petitioners, holding the government had put forth no evidence whatsoever to support venue in the Western District of Oklahoma, and, therefore, petitioners' case could not, consistent with the Constitution, be submitted to a jury. App. A, pp. 22a-24a. The District Court refused to grant petitioners' motions for judgments of acquittal. *Id.* The District Court held that if petitioners were members of any conspiracy to distribute controlled substances, it was one located only within the Eastern District of Oklahoma where petitioners might, the court believed, be reindicted. *Id.*

The government did not question the correctness of the District Court's ruling that there was no evidence of venue which would allow the case to be submitted to the jury as to petitioners, nor its ruling that the government's proof showed multiple conspiracies, if any, and that petitioners were not members of any conspiracy which existed in the Western District of Oklahoma, nor did the government attempt to appeal the District Court's order dismissing the indictment.[1]

---

[1] The reverse is true. At oral argument in the court below, the government conceded that the second indictment was premised entirely upon the assumption that the holding of the District Court for the Western District was correct. The government admitted in the Court of Appeals that if that holding was incorrect, the second indictment *was* barred by double jopardy.

On February 18, 1981, a grand jury in the Eastern District of Oklahoma returned a virtually identical indictment against petitioners, and Mr. Wilkett, charging essentially the same conspiracy to distribute the same controlled narcotic substance as had the first indictment.

The government frankly admitted, in response to petitioners' motions for discovery, that "the government intends with minor exception to use [the] same evidence, exhibits and testimony at the trial of these defendants [as had been used in the trial of the petitioners in the Western District of Oklahoma]."

All defendants moved to dismiss the second indictment on grounds of former jeopardy. The District Court for the Eastern District of Oklahoma denied the three motions. The District Court held that petitioners, and Mr. Wilkett, had the burden of proving that the offense charged in the second indictment was the same as that charged in the first, and of proving that the same evidence would be used in the second trial as was used in the first. The District Court held that petitioners, and Mr. Wilkett, had not met that burden, despite the government's concession. The District Court stated that all defendants could renew their motions at the close of a second trial. App. A, pp. 19a-21a.

All defendants immediately appealed, pointing out that, in light of the identity of charges and of evidence, and the government's concession, the District Court's ruling would lead to the absurd result that defendants could avoid an unconstitutional second trial only by being subjected to it. Such a result, defendants contended, was obviously forbidden by *Abney* v. *United States*, 431 U.S. 651, 661-662 (1977).

The Court of Appeals noted without comment the ruling of the District Court for the Eastern District and, *sub silento*, agreed that it was untenable. App. A, pp. 7a-8a.

Moreover, while the government had charged all three defendants in a single new indictment, the District Court for the Eastern District of Oklahoma had denied the former jeopardy pleas of all defendants on identical grounds, and the Court of Appeals had consolidated the three appeals, the court below proceeded to bifurcate the defendants' appeals in its opinion. The Court of Appeals held that Mr. Wilkett's plea of former jeopardy was a complete bar to his reprosecution because "the government presented its entire case against Wilkett before the trial court [in the Western District] found that there were two conspiracies. . . ." App. A, p. 17a. Yet, the court rejected petitioners' pleas of former jeopardy as to the second indictment despite the fact that the government had *also* "presented its entire case against [petitioners] before the trial court found that there was two conspiracies" and despite the fact that the government freely admitted that it intended to use the "same evidence, exhibits and testimony" in the second trial as it used in the first, as to *all* defendants.

The Court of Appeals repeatedly emphasized that the holding of the District Court for the *Western* District that there were two conspiracies, rather than one, and that petitioners involvement, if any, was in a conspiracy in the Eastern District, only, was not before it for review. Indeed, the Court of Appeals flatly stated:

> "After the government had presented its evidence against *all* of the defendants, the trial court in the Western District concluded that the evidence showed

> two conspiracies and that Conklin and Hoover [petitioners] had to be severed and dismissed for lack of venue . . .
>
> "Here we assume that Wilkett could have been originally prosecuted separately as a result of his involvement in two conspiracies. . . .
>
> *"We are of the opinion that, regardless of whether there was one conspiracy or two conspiracies,* in the trial in the Western District the government introduced every bit of evidence that it had." (Emphasis added.)

Therefore, the Court of Appeals sustained Mr. Wilkett's plea of double jeopardy. App. A, pp. 14a-15a, 18a.

Precisely the same is true as to petitioners, as the Court of Appeals conceded. App. A, p. 14a. Yet, the court below, in a truly baffling opinion, held that petitioners could, nevertheless, be forced to "run the gauntlet" of a second trial on the same evidence yet again.

The stated reason for this Janus-faced result was that the trial in the Western District of Oklahoma against petitioners had ended with a factual finding by the trial court that the government had totally failed to prove venue, rather than a jury verdict. The court below believed this difference was decisive under *United States* v. *Scott*, 437 U.S. 82 (1978). App. A, pp. 10a-11a.

The Court of Appeals conceded that "venue in federal criminal cases is a question of fact which is a part of the prosecution's case." App. A, p. 9a. The court did not dispute the fact that petitioners' first trial ended because the trial court found insufficient evidence of that factual issue to even submit the government's case against petitioners

to the jury. Despite the seemingly obvious relevance of *Burks* v. *United States*, 437 U.S. 1, 16 (1978), to such facts, the Court of Appeals never mentioned that decision. The court did not suggest petitioners' first trial had been terminated because of trial error. The court agreed that petitioners' first trial had ended because of the government's total failure of proof.

But, the court held, since the government's failure of proof concerned a factual element which the court conceived to be "more procedural than substantive", petitioners "were not in jeopardy" and could be subjected to a second trial. App. A, p. 11a.

Apparently agreeing that this unprecedented holding raises a substantial constitutional question, the Court of Appeals granted petitioners' motion to recall the mandates, and stayed further proceedings pending final disposition of this petition for a writ of certiorari. App. A, pp. 1a-2a.

REASONS FOR GRANTING THE WRIT

1. The bifurcated holding of the Court of Appeals regarding the application of Double Jeopardy Clause to the facts here presented is both unprecedented and erroneous. The court below ignored totally the importance of the distinction between "trial error" and "evidentiary insufficiency" which this Court so carefully drew in *Burks, supra*, 437 U.S., at 13-17. The holding below is flatly in conflict with the principle which animates *Burks* and which is "central to the objective of the prohibition against successive trials" (*id.* at 11): Given the strict requirements which a trial court must observe in holding that the government's evidence is so lacking that the case cannot even be submitted to the jury, "the purpose of the Clause would be negated were we to afford the government an opportunity for the proverbial 'second bite at the apple' [after] it has been given one fair opportunity to offer whatever proof it could assemble." *Id.* at 16-17. The record here shows beyond question that the District Court afforded the government a fair — indeed an ample — opportunity to offer all the proof it could assemble. Neither the government nor the Court of Appeals even suggested the contrary.

The court below held that there was no "adjudication of insufficiency of evidence *whereby* [petitioners] *were to be adjudged innocent*[!] App. A, p. 8a (Emphasis added). This is a truly astounding ruling. No defendant in a crimnial case can constitutionally be forced to bear the burden of proving himself "innocent". *In Re Winship*, 397 U.S. 558, 564 (1970).

Rather, the sole relevant question is whether the government failed to adduce proof of a factual element of its case sufficient to justify submitting the case to the jury. *Burks, supra,* at 10-11; 16-18. The government failed to do so. The trial court so found, and the government has never suggested the trial court was incorrect. Quite the contrary. See n.1, *supra,* p. 4. On these facts, it should be obvious beyond argument that the decision below stands *Burks* on its head. Plenary review by this Court is clearly warranted to correct such a holding by a Court of Appeals reviewing all criminal convictions throughout the six states within the Tenth Circuit. The holding of the Court of Appeals is wrong both in principle and in practical effect, and it sanctions serious injustice.

The decision below impermissibly allows the government:

> "to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty", *Green* v. *United States,* 355 U.S. 184, 187-188 (1957).

The decision below also constitutes an open invitation to prosecutors in the Tenth Circuit to return indictments in marginal cases within a district in which venue is either non-existent or dubious in order to strengthen a doubtful case at a second trial. As would any litigant, the government has been known to take advantage of such an opportunity. *See, Arizona* v. *Washington,* 434 U.S. 497, 504 n.14 (1978), *quoting, Carsey* v. *United States,* 129 U.S. App D.C. 205, 208-209, 392 F.2d 810, 813-814 (1967).

While *Arizona* v. *Washington, supra,* 434 U.S., at 508 n.24, emphatically states that "[t]he prohibition against double jeopardy unquestionably 'forbids the prosecutor to use the first proceeding as a trial run of his case' ", the decision below has the practical effect of inviting prosecutors in the Tenth Circuit to do precisely that.

The court below viewed *United States* v. *Scott,* 437 U.S. 82 (1978), as controlling. This is plainly untenable. *Scott* is uttery irrelevant to this case for the simple but conclusive reason that no appeal by the United States under 18 U.S.C. §3731 was before the Court of Appeals.

Scott defines the outer parameters of the government's right of appeal under 18 U.S.C. §3731. Whether *Scott* would have permitted an appeal by the government from the order of the District Court for the Western District of Oklahoma dismissing the indictment against petitioners was not before the Court of Appeals and is not presented here. And nothing in *Scott* speaks to the Double Jeopardy Clause issues which are raised when the government foregoes any right of appeal it might have had, allows an order dismissing an indictment for failure of the government to prove an indispensible factual element of its case to become final, and then seeks to reindict the defendant upon an identical indictment and to prosecute him upon identical evidence in a second trial in a different judicial district. *See, Scott, supra,* 437 U.S., at 100 n.13. The apparent belief of the court below that *Scott* supports — let alone required — the extraordinary result which it reached is patently erroneous. Its implicit suggestion that *Burks* is inapplicable to a "procedural" element of proof, or that the principle of *Burks* has no application unless the trial

court holds a criminal defendant should be "adjudged *innocent*" is astonishing. These errors are of far-reaching importance. The Court should not allow such holdings to go unreviewed.[2]

2. The inexplicably bifurcated result reached by the Court of Appeals was heavily colored by the court's novel view of the nature of venue in federal criminal cases. The court below suggested that "venue is wholly neutral; it is a question of procedure, more than anything else . . ." App. A, p. 9a. This statement plainly cannot be reconciled with the repeated admonition of this Court that, in federal criminal cases, "questions of venue are not mere matters of procedure"; and that questions of venue in federal criminal cases "raise deep issues of public policy. . . ." *United States* v. *Johnson*, 323 U.S. 273, 276 (1944).

Apart from this misconception, the holding below that petitioners "were not in jeopardy", App. A, p. 11a, despite their trial in the Western District of Oklahoma, because proof of the existence of venue involved only proof of "an element which is more procedural than substantive" (*id.*) raises Double Jeopardy Clause questions of the first magnitude.

The flaws in such an analysis are many and severe.

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[2] The Court of Appeals interpreted the critical phrase "a resolution . . . of some or all of the factual elements of the offense charged", *United States* v. *Scott*, 437 U.S., at 97, *quoting*, *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977), to mean "an adjudication of insufficiency of evidence whereby defendants were to be adjudged *innocent*." [!] (Emphasis added.) It needs no citation beyond *In Re Winship*, 397 U.S. 558, 564 (1970), to show that such an interpretation is constitutional error regarding a "bedrock 'axiomatic and elementary' principle. . . ."

The Court of Appeals failed to give heed to its own recognition that, in a federal criminal case, venue is a question of fact which is, absent waiver by the defendant, an indispensable element of the government's case-in-chief. The court below also misapprehended a critical point: proof of venue, like proof of all questions of fact in federal criminal cases, is normally a question for the jury to decide, under proper instructions from the trial court. *United States* v. *Black Cloud*, 590 F.2d 270, 272-273 (8th Cir. 1979); *United States* v. *Catalano*, 491 F.2d 268 (2d Cir.) *cert. denied*, 419 U.S. 825 (1974).

Where, however, the trial court is compelled to hold that the government has introduced *no* evidence showing the existence of venue over the offense charged in the indictment, the trial court cannot constitutionally permit the case to be submitted to the jury.

Burks sought to alleviate the "conceptual confusion" in Double Jeopardy Clause analysis caused by failing to distinguish between "trial error" and "evidentiary insufficiency" in the government case. 437 U.S., at 15-16. The critical point of *Burks*, ignored by the Court of Appeals, is that if the District Court in the first trial had submitted the government's case against petitioners to the jury, the jury would, under proper instructions, have been required to return a verdict of not guilty because proof of venue is "an essential part of the government's case." *United States* v. *Budge*, 359 F.2d 732, 734 (7th Cir. 1966); *United States* v. *Black Cloud*, 590 F.2d 270, 272-273 (8th Cir. 1979). And "since we necessarily afford absolute finality to a jury's *verdict* of acquittal" the same result must follow when "the government's case was so lacking that it should not

have even been *submitted* to the jury" as, in this case, it was not. *Burks, supra.* (Emphasis by the Court.)

Burks illuminates clearly both the error and the injustice of the decision below. In the cases now here for review, the government presented no evidence on a critical factual issue: the existence of venue in the district wherein the government elected to bring the charge. The District Court, therefore, had no choice other than to refuse to submit the government's case against petitioners to the jury. If, however, the government had been able to adduce a single act supporting an inference of venue in the Western District of Oklahoma, the District Court would have been required to submit the case to the jury with instructions to determine whether the jury believed the government had established as a fact the existence of venue, by a preponderance of the evidence. The District Court would have been required to instruct the jury that if it found the government had failed to do so, it must acquit. If such an acquittal had been returned, no one would suggest that petitioners could be reprosecuted, on an identical indictment, and with the same evidence, in a different judicial district. It would be perverse to hold that if the government's proof on a critical factual issue is marginally sufficient to take the case to the jury, but insufficient to convince a properly instructed jury to convict, a second trial is barred by the Double Jeopardy Clause, but that if the government's evidence on that critical factual issue is so totally insufficient that the trial court cannot even submit the case to the jury, the defendant must "run the gauntlet" a second time in a second trial. The Court rejected such an argument in *Burks*. Yet that perversion of the fundamental guarantee against

being twice put in jeopardy is the precise result reached by the Court of Appeals. The result should not be allowed to stand. And the holding of *Burks* surely cannot be made to turn on whether the insufficiency in the government's evidence is insufficiency of proof of an "element" which is "procedural" or "substantive" or, in the words of the court below, "more procedural than substantive". App. A, p. 11a.[3]

Rather, contrary the belief of the Court of Appeals, the single inquiry is whether the unproven fact constitutes an essential part of the government's case, one upon which proof must be adduced before the government may properly have its case submitted to the jury. It is settled by cases beyond number that proof of venue is an "essential part of the government's case," *United States* v. *Kampiles*, 609 F.2d 1233, 1238 (9th Cir. 1979), in all federal criminal prosecutions. The Sixth Amendment makes it so by its very words.

In this case, the government chose to force petitioners to trial in a district in which it had no evidence of venue whatsoever. The government insisted on doing so dispite timely pretrial motions arguing vigorously that there was want of venue, *cf. Lee* v. *United States*, 432 U.S. 23, 33 (1977), thus subjecting petitioners "to the 'embarrassment, expense and ordeal' of a needless trial." *Lee, supra*, 432 U.S., at 35 (BRENNAN, J., concurring), *quoting, Green* v.

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[3] This holding truly cast the appeals into "the eerie atmosphere of never-never land." *Meredith* v. *Fair*, 298 F.2d 696, 701 (5th Cir. 1962). These cases involve the proper interpretation of the Double Jeopardy Clause in a repetitive criminal prosecution, not the applicability of a Federal Rule of Civil Procedure in a diversity case. *Cf, Benton* v. *Maryland*, 395 U.S. 784, 796-797 (1969).

United States, 355 U.S. 184, 187 (1957); *see, also, Jeffers* v. *United States*, 432 U.S. 137, 152, n.20 (1977) (plurality opinion); *id.*, at, 159-160 (STEVENS, BRENNAN, STEWART and MARSHALL, J.J., dissenting).

3. Nor can the belief of the Court of Appeals that Mr. Wilkett's plea of former jeopardy was good, while petitioners' pleas were not, because Mr. Wilkett's case had resulted in a verdict from the jury while petitioners' case had been withdrawn from the jury because of the utter insufficiency of the government's evidence, withstand analysis. It is settled doctrine under the Double Jeopardy Clause that the Clause is not limited only to those circumstances in which the issue of "guilt" has been finally and conclusively resolved by the verdict of a jury. *Crist* v. *Bretz*, 437 U.S. 27, 35, 38 (1978); *Green* v. *United States*, 355 U.S. 184, 187-188 (1957). Yet, if this makeweight is taken out of the opinion of the Court of Appeals, that court's own reasoning in holding that Mr. Wilkett's subsequent prosecution in the Eastern District of Oklahoma was barred by his plea of former jeopardy in and of itself shows that petitioners' pleas of former jeopardy should also have been sustained.

CONCLUSION

The decision of the Court of Appeals represents both an unprecedented and a fatally flawed analysis of vital Double Jeopardy Clause principles. It permits serious injustice to be visited upon petitioners—injustice which will, absent review by the Court, continue to recur within the Tenth Circuit.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September, 1981

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, hereby certifies that three (3) true and correct copies of the above and foregoing petition for a writ of certiorari were mailed by certified mail, postage fully prepaid this _____ day of September, 1981, to all parties required to be served to-wit:

The Solicitor General of the United States
Office of the Solicitor General
United States Department of Justice
Washington, D.C. 20530

Bernard J. Rothbaum, Jr.

APPENDIX A

JULY TERM — AUGUST 18, 1981

Before Honorable Robert H. McWilliams and Honorable William E. Doyle, Circuit Judges, and Honorable Ewing T. Kerr*, District Court Judge.

UNITED STATES OF AMERICA,	)	No. 81-1295
Plaintiff-Appellee,	)	(D.C. No.
vs.	)	81-00010-02CR)
	)	
THOMAS H. CONKLIN, JR.,	)	No. 81-1296
JOE F. HOOVER,	)	(D.C. No.
Defendants-Appellants.	)	81-00010-03CR)

This matter comes on for consideration of the motion of appellants in the captioned causes requesting this Court to recall its mandates and to stay the trial of appellants pending disposition of their petitions for writ of certiorari to the Supreme Court of the United States.

Upon consideration whereof, it is ordered as follows:

1. The motions of appellants for recall of the mandates are granted. The United States District Court for the Eastern District of Oklahoma is ordered to return the mandates in the captioned appeals which were forwarded to that court on July 30, 1981.

2. Further proceedings in the trial court in connection with appellants are stayed for thirty (30) days from this date.

3. If the appellants, or either of them, shall file a timely petition for writ of certiorari with the Supreme Court of the United States on or before September 17, 1981, the reissuance of this Court's mandates shall continue to be stayed as to such timely filing or filings until dis-

*Of the United States District Court for the District of Wyoming, sitting by designation.

position of the petition or petitions for writ of certiorari by the Supreme Court of the United States.

A true copy
Teste

(s) *Howard K. Phillips*
Clerk

(s) *Chere Bassed*, Deputy Clerk

PUBLISH

[Filed in U. S. Court of Appeals, June 24, 1981]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JAMES WILKETT,	)	
THOMAS H. CONKLIN, JR.,	)	
and JOE F. HOOVER,	)	Nos. 81-1294
Defendants-Appellants,	)	81-1295
v.	)	81-1296
	)	
UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee.	)	

Appeal from the United States District Court
For the Eastern District of Oklahoma
(D. C. No. 81-10-CR)

Gene Stipe, Stipe, Stipe, Gossett, Harper & Estes, Oklahoma City, Oklahoma, (Mitchell A. Lee, Stipe, Gossett, Stipe, Harper & Estes, Oklahoma City, Oklahoma, with him on the brief) for appellant Wilkett; William J. Skepnek, Linn, Helms, Kirk & Burkett, Oklahoma City, Oklahoma, (William R. Burkett, Linn, Helms, Kirk & Burkett, Oklahoma

City, Oklahoma, with him on the brief) for appellant Conklin; Carl D. Hughes, Hughes, Nelson & Blessington, Oklahoma City, Oklahoma, for appellant Hoover.

James F. Robinson, Special Assistant United States Attorney, Muskogee, Oklahoma, (James E. Edmondson, United States Attorney, Muskogee, Oklahoma, with him on the brief) for Appellee.

Before McWILLIAMS and DOYLE, Circuit Judges, and KERR*.

DOYLE, Circuit Judge.

We here consider three consolidated appeals, all of which involve the former jeopardy provision of the Fifth Amendment to the Constitution of the United States. The issue as to defendants-appellants Conklin and Hoover are similar, if not the same. The problems in the case of Wilkett are different from those present in the Conklin and Hoover cause. Therefore, the latter two defendants will be first considered and we will take up Wilkett thereafter.

Part I

United States v. *Conklin and Hoover*

The ultimate issue to be determined is whether the defendants are entitled to a ruling that further prosecution in the Eastern District of Oklahoma is precluded because of alleged former jeopardy which they contend arose from a prosecution in the Western District of Oklahoma.

Conklin, Hoover, Wilkett and the others, were charged with conspiring in the Western District to distribute a controlled substance in violation of 21 U.S.C. § 2846 [*sic*]. Wil-

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*Honorable Ewing T. Kerr, U. S. District Judge, Cheyenne, Wyoming, sitting by designation.

kett was convicted by a jury; Conklin and Hoover were not convicted because after the completion of the government's case they moved for dismissal of the indictment which the court granted on grounds of lack of venue resulting from a failure to prove Conklin's and Hoover's involvement in the Western District activities.

The court in the Western District trial determined that there were distinct conspiracies in the Eastern and Western Districts and that there was sufficient evidence to support belief that Conklin and Hoover were involved in a separate but related conspiracy which took place in the Eastern District. Whether the judge in the Western District could have solved the problem by use of some other approach need not be considered. We need only review those matters which have been presented. We do notice the division of the conspiracy into two conspiracies — one applicable to the Western District and the other applicable to the Eastern District. The effect of this is that the government is now precluded from using the overt acts which occurred in the west.

Very soon after this dismissal, Conklin and Hoover were indicted in the Eastern District, where they were charged with the new conspiracy. Wilkett was also named in this conspiracy, notwithstanding that he had been convicted in the Western District. All three defendants interposed former jeopardy contentions. Wilkett claimed that the attempted Eastern District prosecution of him was barred by his conviction in the Western District. Conklin and Hoover have claimed that the termination of their prosecution constituted an effective bar to the Eastern District effort, but the termination of their case was predicated on lack of venue. On the other hand, Wilkett contends that there was a final judgment on the merits in his case; that he has been adjudged guilty of a conspiracy which is indistinguishable from the new prosecution in the Eastern District.

Discussion of Issues

Conklin and Hoover's main contention is that a further trial (in the Eastern District of Oklahoma) is barred because they have been placed in jeopardy as a result of the proceedings in the first trial. They point to:

a. That the indictment in the present trial is virtually the same as that in the first trial.

b. That the dismissal in the first trial, the granting of a motion, amounted to a judgment of acquittal and that this should be recognized as a foundation for a conclusion that there was double jeopardy.

c. That defendants took the initiative in seeking a dismissal because of prosecutorial over-reaching.

In the Western District case the court granted the motion to dismiss Conklin and Hoover and did so based on lack of venue, which resulted from the fact that their activities were restricted to the Eastern District.

The indictment in the Western District against Conklin and Hoover and the others had alleged a conspiracy to distribute a controlled substance. Conklin is a doctor of osteopathy and Hoover is a pharmacist. They were alleged to have been involved in writing and filling prescriptions for Dilaudid for the third defendant Wilkett. The assumption was that Wilkett was going to use the drug illegally to dope racehorses in the Eastern District. Wilkett did use the drug, but he distributed the drug throughout Oklahoma City in the Western District for human consumption.

The overt acts of Conklin and Hoover in writing and filling prescriptions occurred in the Eastern District. The government's original theory was that this activity of Conklin and Hoover was part of one large conspiracy; that some of the acts took place in the Western District and others occurred in the Eastern District.

Conklin and Hoover, from the start, advanced the proposition that the indictment in the Western District was improper on its face, in that it did not adequately plead that the crimes occurred in the Western District. When the judge was presented with this argument, he denied the motion and decided that the indictment's allegation that the conspiracy took place in the Western District, the Eastern District and elsewhere was sufficient. The judge stated that if at the end of the government's case there was a failure to prove formation of the conspiracy or the occurrence of an overt act in the Western District, the defendants could renew their motion.

The government succeeded in showing overt acts in the Western District, but was unable to prove that Conklin and Hoover were parties to the acts there. At the end of all the evidence therefor [*sic*] the motion for dismissal of the indictment was reargued and the trial court's order followed.[1]

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[1] It stated:

When, as here, a single conspiracy has been charged and the evidence shows the existence of two separate conspiracies, there are at least two courses open to the Court. In United States v. Butler, [494 F.2d 1246 (10th Cir. 1974)], the Tenth Circuit outlined the possibilities; (1) the trial may continue against all defendants, with cautionary instructions to the jury regarding multiple conspiracies, or (2) when the prejudice to some defendants from the spill-over evidence or the possibility of guilt by association cannot be cured by cautionary instructions, the Court may require the government to elect against which defendants it chooses to proceed and the remainder are severed for separate trial. In the circumstances of this case, the selection of either course mandates the same result. Having found that Hoover and Conklin are not members of the conspiracy charged against the remaining defendants, the Court cannot allow the jury to reach a verdict against them on a separate conspiracy, or allow the government to elect to proceed against them, because there is, by the government's own admission, no act or agreement upon which venue can be laid against Hoover or Conklin in the Western District of Oklahoma, without connecting them to the larger conspiracy. Any agree-

The motion for severance and dismissal of the defendants Hoover and Conklin was thus granted and the indictment against these two defendants was dismissed because of lack of proof of venue.

At the time of the order, no one took exception to the trial court's determination that there were two conspiracies. It assumed more importance when Conklin and Hoover were subsequently indicted in the Eastern District, where the resulting indictment was almost identical to the indictment in the Western District. The government apparently agreed that except for minor modifications the case which was presented against Conklin and Hoover in the Western District would be presented against them in the Eastern District.

On motion of the defendants for dismissal on the grounds of double jeopardy, the trial judge in the Eastern District concluded that under the same evidence test, United States v. Martinez, 562 F.2d 633 (10th Cir. 1977), the defendants had not sustained the burden of proving that the offense in the Western District was the same as that charged in the Eastern District. The Eastern District trial judge did state, however, that the matter would be reconsidered in light of the full trial record in the Eastern District.

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[1] (Continued)

ment of which they were a part, and any act in furtherance of such agreement, took place entirely within the Eastern District. Under the Sixth Amendment to the Constitution of the Unied States and Rule 18, Federal Rules of Criminal Procedure, venue lies in the district wherein the crime was committed. There being no venue in this district over the criminal acts charged against defendants Hoover and Conklin, as a matter of law the indictment against them here must be dismissed. These defendants are not acquitted, and they may be properly charged and tried in the Eastern District of Oklahoma where the alleged criminal acts occurred.

In accordance with the foregoing, the Court concludes and orders as follows: The motion for judgment of acquittal is denied. The motion for severance of defendants Hoover and Conklin is granted, and the indictment against these two defendants is dismissed for lack of venue.

[APPENDIX]

The contention of appellants is that the conspiracy as charged and as tried to the jury in the Western District of Oklahoma included all of the available evidence of activities in both districts.

The view which we take is that the appellants were responsible for the dismissal, and that the dismissal was not predicated upon the merits of the case, that is, the insufficiency of the evidence to convict. Thus, there was not an adjudication of insufficiency of evidence whereby defendants were to be adjudged innocent. We do not, therefore, consider it necessary to decide whether there were two conspiracies or one.

The dismissal was predicated upon the failure of the proof to establish that Conklin and Hoover were part of a conspiracy in the Western District. Hence, there was a failure to establish venue. The provable acts which tied them to the conspiracy with the other defendants and Wilkett was their writing of prescriptions and filling them, and the furnishing of the narcotics. All of these acts took place in the Eastern District.

Prosecutorial Over-Reaching

The appellants also seek to establish that their motion to dismiss in the Western District does not prevent their jeopardy contention. They say the motion to dismiss on their part was a matter of necessity brought on by prosecutorial over-reaching. They assert that the prosecution forced the jeopardy issue prior to dismissal and that it should have resolved the issue at pretrial.

We see no prosecutorial over-reaching. If there was any failure on the part of the government it certainly does not appear that it was any intentional effort to harrass the defendants. United States v. Dinitz, 424 U.S. 600 (1976), is not applicable. The government was proceeding in the Western District on the theory that there was one conspir-

acy, and not, as the defendants assert, on the theory of there being two conspiracies with enough of an overlap in evidence to allow successful prosecution of only one.

In any event the defendants appear to now concede that lack of venue was the reason for the trial's termination, but they contend that lack of venue itself is equivalent to a judgment of acquittal, which gives substance to their contention that former jeopardy exists as the result of the dismissal. We disagree with this. It does appear that the prosecution was unaware of the existence of two conspiracies. Regardless of this, it is not necessary to decide whether there is one conspiracy or two at this point. The sole relevant point is that the judgment of dismissal was based upon the failure to prove venue.

Nature of Venue

Venue in federal criminal cases is a question of fact which is part of the prosecution's case. United States v. Rivera, 388 F.2d 545 (2nd Cir.), cert. denied 392 U.S. 937 (1968); and it is not jurisdictional; United States v. Walden, 464 F.2d 1015 (4th Cir. 1972), cert. denied 410 U.S. 969 (1973). However, unlike other facts in the prosecution's case, it need only be proven by a preponderance of the evidence; United States v. Black Cloud, 590 F.2d 270 (8th Cir. 1979); United States v. Karavias, 170 F.2d 968 (7th Cir. 1948); and it can be waived; United States v. Jercha, 458 F.2d 1340 (8th Cir. 1972); Jenkins v. United States, 392 F.2d 303 (10th Cir. 1968). In fact, it can be waived by implication; United States v. Marcello, 423 F.2d 993 (5th Cir.), cert. denied 318 U.S. 959 (1970); United States v. Jones, 162 F.2d 72 (2nd Cir. 1947).

Venue is, of course, unlike the substantive facts which bear on guilt or innocence in the case. Venue is wholly neutral; it is a question of procedure, more than anything else, and it does not either prove or disprove the guilt of the accused. Thus, Conklin and Hoover did not as a result

of the action in the trial court have a resolution of some or all of the merits of the offense charged. The termination of the case was not "a resolution, correct or not, of some or all of the federal [*sic*] *elements* of the offense charged." Lee v. United States, 432 U.S. 23 at 30,n.8 (1977), quoting United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (emphasis added); United States v. McDonough, 603 F.2d 19 (7th Cir. 1979).

Summary

In final analysis the concern is whether the dismissal was on the merits or not. The presence or absence of former jeopardy depends on this factor. Recent decisions of the Supreme Court establish this. United States v. Scott, 432 U.S. 82 (1978); United States v. Martin Linen Supply Co., *supra*, and Lee v. United States, *supra*. The definitive case on this question is United States v. Scott. There it was emphasized that the motion for mistrial is an important sign which tends to indicate that the granting of the motion is a final disposition of the case. The Supreme Court in *Scott* recognized, however, that the basic principle which threads through the former jeopardy rule is that the state with its resources and powers is not to be allowed to make repeated attempts to convict an individual for a single offense, thereby subjecting him to embarrassment, expense, ordeal, anxiety and insecurity. Therefore, the workings of the jeopardy doctrine revolves around guilt or innocence, and it is a second effort to prove guilt or innocence which is subject to the double jeopardy ban.

But where, as here, the accused himself brings about the termination of the proceedings on a basis other than adjudication of guilt or innocence, former jeopardy does not take hold.

We need not address whether there was one conspiracy or two; or whether the conspiracy originated in one place or another, because the disposition was not on the failure

of the government to prove some aspect of the crime of conspiracy. Rather it failed to prove an element which is more procedural than substantive, namely, venue, or place of trial. The trial court did not reach the issue of guilt or innocence.

The Supreme Court, in *Scott*, quotes from an earlier case, Jorn v. United States, 400 U.S. at 44, wherein the late Justice Harlan, who wrote the opinion, said:

> In the second situation the defendant has not been deprived of his option to go to the first jury, and, perhaps end the dispute then and there with an acquittal. On the other hand, where the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his 'valued right to have his trial completed by a particular tribunal.'

The significant points in deciding whether or not jeopardy has attached and is applicable are: *First*, was the case terminated at the behest of the defendant, and *second*, whether the decision to terminate resulted from an adjudication of innocence. If the end was brought about by the court or the prosecution, it becomes an argument, at least, that the accused has been deprived of his right to be finally judged by the court in which the trial is being conducted.

Therefore, it was held in *Scott*, that when the defendant seeks to have the trial terminated without submission to a judge or jury as to guilt or innocence, an appeal by the government from his termination effort can be carried out and there can be retrial.

We hold, therefore, under *United States* v. *Scott* and its precursors that the defendants were not in jeopardy and that they can be retried in the district where the crime was committed.

PART II

James D. Wilkett v. *United States*

Appellant was indicted in the Western District of Oklahoma together with Conklin, Hoover and four other alleged co-conspirators. Following the severance of Conklin and Hoover, the government dismissed its case as to another defendant, and the trial continued against Wilkett and the other three remaining defendants. On December 16, 1980, the jury returned a verdict of guilty against all four defendants. Wilkett has appealed. On February 18, 1981, which was not long after the termination of the case in the Western District, Wilkett was indicted in the Eastern District of Oklahoma along with Conklin and Hoover. Like the Western District indictment, that in the Eastern District alleges that Wilkett conspired to distribute a controlled substance, Dilaudid, in violation of 21 U.S.C. § 846.

Wilkett moved for a dismissal of the indictment in the Eastern District on the ground that the double jeopardy clause of the Fifth Amendment operated as a bar to the second prosecution. This motion was denied. Wilkett appeals that ruling in this court.

The issue raised by Wilkett's appeal differs significantly from the arguments advanced by Conklin and Hoover. The trial against Wilkett went to completion on the merits in the Western District, and the jury found Wilkett guilty. He is now in prison. Therefore, the question which is to be decided here is whether Wilkett has been tried and convicted of the crimes now charged in the Eastern District. We must conclude that the allegations which are set forth in the indictment which he faces in the Eastern District contains the same allegations as the indictment in the Western District. The former jeopardy provision of the Fifth Amendment would seem to apply to the attempted prosecution in the Eastern District.

The Fifth Amendment, after providing that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia in national service in time of war or public danger, goes on to say:

> "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

So, then, the Fifth Amendment protects against twice being prosecuted and punished for the same offense following an acquittal or conviction on the merits. The protection is against the second prosecution and against multiple punishments for the same offense as well. *See* United States v. Wilson, 420 U.S. 332, 343 (1975). *See also* North Carolina v. Pearce, 395 U.S. 711, 717 (1969); Brown v. Ohio, 432 U.S. 161 (1977); Tipton v. Baker, 432 F.2d 245 (10th Cir. 1970). It is therefore clear that if the conspiracy charged in the Eastern District is the "same offense" as the conspiracy charged in the Western District, Wilkett's conviction in the Western District bars his prosecution.

On its face, it appears that the Eastern District indictment charges the identical crime as the Western District indictment, because it uses virtually the same language, including the same overt acts. In the case of substantive offenses the test generally used to determine whether or not double jeopardy applies is the same evidence test. If the same evidence would sustain a conviction of the second offense, the double jeopardy clause bars prosecution of the second offense. Waters v. United States, 328 F.2d 739 (10th Cir. 1964); Aiuppa v. United States, 393 F.2d 597 (10th Cir. 1968), vacated on other grounds, Giordano v. United States, 394 U.S. 310 (1969); Robbins v. United States, 476 F.2d 26 (10th Cir. 1973). Conversely, if each statute requires proof of a fact not required by the other statute, double jeopardy does not prevent prosecution for both crimes. Blockburger v. United States, 284 U.S. 299 (1932); Brown v. Ohio, 432

U.S. 161 (1977); Goldsmith v. Cheney, 447 F.2d 624 (10th Cir. 1971).

However, the same evidence test is not always adequate for testing applicability of the former jeopardy principle where the two crimes charged are both conspiracies. Conspiracies frequently involve several or even dozens of overt acts and may extend over several months or years. Thus, it may frequently be possible to show the existence of a single conspiracy through proof of more than one set of facts. If two charges of conspiracy are in fact based on a defendant's participation in a single conspiracy, the former jeopardy clause bars the second prosecution. United States v. Wilshire Oil Co. of Texas, 427 F.2d 969 (10th Cir. 1970), *cert. denied*, 400 U.S. 829 (1970); United States v. Tercero, 580 F.2d 312 (8th Cir. 1978). As a consequence, it may be necessary to look beyond the question of what evidence will be offered in proof of the two conspiracies, and to determine whether under all the circumstances a single conspiracy is present. On the other hand, the fact that the two conspiracies overlap with regard to members and time period does not necessarily mean that the conspiracies are not the same for double jeopardy purposes. United States v. Martinez, 562 F.2d 633 (10th Cir. 1977); United States v. Wilshire Oil Co., *supra*.

Originally, it was the government's position that Wilkett, Conklin, Hoover and the other defendants were all members of one single conspiracy, that is, an agreement which took place in Oklahoma and which was evidenced in part by acts of Conklin and Hoover. After the government had presented its case against all of the defendants, the trial court in the Western District concluded that the evidence showed two separate conspiracies and that Conklin and Hoover had to be severed and dismissed for lack of venue. Based on this ruling, the government now argues that Wilkett was a member of two separate conspiracies and may therefore be prosecuted with Conklin and Hoover in the Eastern District.

It has not been necessary in this appeal to determine whether the trial court was correct in the view that there are two conspiracies here. Here we assume that Wilkett could have been originally prosecuted separately as the result of his involvement in two conspiracies. Even if we were to assume that Wilkett originally could have been prosecuted separately for his involvement in two conspiracies, a review of the indictments and the record in the Eastern District leads to the conclusion that Wilkett was prosecuted for all of his conspiratorial activities in the Western District.

Turning first to the language of the indictments, we note that one of the two major functions of an indictment is to provide protection from a subsequent prosecution of the same offense. Russell v. United States, 369 U.S. 749, 764 (1962); United States v. Watson, 594 F.2d 1330, 1341 (10th Cir. 1979), *cert. denied*, Brown v. United States, 444 U.S. 840 (1979); United States v. Sterkel, 430 F.2d 1262 (10th Cir. 1970).

> The precise manner in which an indictment is drawn cannot be ignored, because an important function of the indictment is to ensure that, 'in case any other proceedings are taken against [the defendant] for a similar offense, . . . the record [will] sho[w] with accuracy to what extent he may plead a former acquittal or conviction.' Sanabria v. United States, 437 U.S. 54, 65-66 (1978), quoting Cochran v. United States, 157 U.S. 286, 290 (1895).

The indictment which was returned in the Western District alleges that "from on or about August, 1979, and continuously thereafter until on or about July of 1980, in the Western District of Oklahoma, *the Eastern District of Oklahoma*, and elsewhere," Wilkett, Conklin, Hoover and four other named defendants conspired to distribute Dilaudid in violation of 21 U.S.C. § 846. (emphasis added) The Eastern District indictment alleges that "from on or

about the 21st day of March, 1979, and continuously thereafter until on or about the 9th day of June, 1980, in the Eastern District of Oklahoma," Wilkett, Conklin and Hoover conspired to distribute Dilaudid in violation of 21 U.S.C. § 846. About the only difference between the two indictments is that the Eastern District conspiracy is alleged to have commenced a few months earlier than the conspiracy in the Western District. The general conspiracy allegations of the Western District indictment appear to be inclusive of the allegations in the Eastern District indictment.

After the introductory paragraphs, the indictments go on to list a number of overt acts allegedly committed in pursuit of the conspiracies and which, of course, evidence the conspiracies. The first four acts listed in each indictment are identical, and deal with the alleged scheme pursuant to which Conklin wrote and Hoover filled prescriptions for Dilaudid in the name of Wilkett and others. The last overt acts listed in each indictment differ. The Western District indictment alleges that Wilkett transferred Dilaudid to co-conspirator Harold Dean Behrens, who in turn distributed to co-conspirator Fred Weed, "for purposes other than accepted medical uses." The Eastern District indictment, on the other hand, states that Wilkett possessed the Dilaudid "with intent to distribute for purposes other than legitimate medical use, need and purpose." In our view, the listings of overt acts in the two indictments are entirely consistent with a conclusion that the Eastern District indictment is based in large part, if not entirely, on the same criminal activity which is covered by the Western District indictment.

Thus, it is clear that the indictment in the Western District included Wilkett's activities in the Eastern District. With the exception of the alleged starting dates of the conspiracies, the indictments on their faces support this conclusion. Furthermore, the Western District indictment was drafted based upon the government's original theory that all of Wilkett's activity occurred pursuant to a single

conspiracy. The fact that the trial court concluded that there were two conspiracies does not change the fact that Wilkett was indicted based on all of his criminal activity. *See,* Berger v. United States, 295 U.S. 78, 83 (1935). Also of significance is the fact that the government intends to introduce the same evidence in the Eastern District trial which was introduced in the Western District "with minor exception." In the light of the fact that the government presented its entire case against Wilkett before the trial court found that there were two conspiracies, the probability that no new evidence will be presented in the Eastern District supports the conclusion that former jeopardy exists.

Although the same evidence test has its shortcomings in the conspiracy context, the fact that there is not going to be any new evidence in the Eastern District should be scrutinized very carefully. When the government seeks to prove two conspiracies by introducing evidence of distinct overt acts, the same evidence test may not adequately guard against dual prosecutions based on a single conspiracy. Where, as here, the government seeks to convict a defendant of a second conspiracy based on the same evidence, there is at least a strong inference that the defendant is in fact being retried for the same illegal activity. It is possible that the evidence necessary to sustain a conviction in the Western District may not be sufficient to sustain a conviction in the Eastern District conspiracy. If Wilkett had been charged and tried only for his activities in the Western District, the trial in the Eastern District might have involved evidence not introduced and charges not included in the Western District proceedings. However, the government presented all of its evidence against Wilkett in the Western District trial. Since this is so, there isn't anything else that is new or different to be presented in the Eastern District. Wilkett has been indicted, tried and convicted for his activities in both districts and so the government is precluded from seeking to retry him for some portion of his activity which has already been sub-

ject to a trial on the evidence. We are of the opinion that, regardless of whether there is one conspiracy or two conspiracies, in the trial in the Western District the government introduced every bit of evidence that it had.

Accordingly we must conclude that the trial court erred in denying Wilkett's motion to dismiss. This order is reversed and remanded with instructions to dismiss the indictment against Wilkett. The portion of the order denying the dismissal of appellants Conklin and Hoover is affirmed for the reasons that are discussed and considered in Part I of the opinion.

JULY TERM—July 22, 1981

Before Honorable Robert H. McWilliams, Honorable William E. Doyle, Circuit Judges and Honorable Ewing T. Kerr* District Court Judge.

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
vs.	)	Nos. 81-1295
	)	and
THOMAS H. CONKLIN, JR.,	)	81-1296
JOE F. HOOVER,	)	
Defendants-Appellants.	)	

This matter comes on for consideration of appellants' motions for petitions for rehearing and motions for stay of mandates filed in the captioned appeals.

Upon consideration whereof, these motions are denied.

(s) *Howard K. Phillips*
Clerk

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*Of the United States District Court, Cheyenne, Wyoming, sitting be [*sic*] designation.

[Filed March 10, 1981 in U. S. District Court]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
-vs-	)	No. 81-10-Cr.
JAMES D. WILKETT, et al., Defendants.	)	

ORDER

DENYING DEFENDANTS' MOTIONS TO DISMISS ON GROUNDS OF DOUBLE JEOPARDY.

Each of the defendants, Wilkett, Conklin and Hoover, have moved to dismiss the indictment for the reason it places them in double jeopardy in violation of the Fifth Amendment to the Constitution of the United States of America.

Each of these defendants were indicted with four other defendants in the Western District of Oklahoma on October 6, 1980, in an indictment whose allegations are strikingly similar, although not identical, to the allegations contained in the indictment herein. Both indictments allege conspiracies in violation of 21 U.S.C. 846, and differ only in the allegations of the additional parties in the Western District indictment and slightly different, but overlapping, beginning and ending dates of the alleged conspiracies.

After two days of trial, and after the government had rested its case, on the Western District indictment, the trial judge severed the defendants Thomas H. Conklin and Joe Hoover on defendants' motion, upon a finding that these defendants were not members of the conspiracy charged against the remaining defendants. Further, the trial judge dismissed the severed defendants, Conklin and Hoover, from

the indictment, on defendants' motion, upon a finding that any conspiracy of which they may have been members took place entirely within the Eastern District of Oklahoma, and there was no venue in the Western District of Oklahoma.

The defendant herein, James D. Wilkett, was subsequently convicted by the jury on the Western District indictment.

Two questions are raised by defendants' motion to dismiss on grounds of double jeopardy:

(1) Is the offense for which defendants are indicted in this case the "same offense" on which they were indicted and tried in the Western District of Oklahoma?

(2) If it is the same offense, do the trial procedings in the Western District case bar prosecution of these defendants in this case on the basis of being twice put in jeopardy?

Although the issue of "same offense" is usually no problem in substantive offenses, the issue is not so easily determined in conspiracy offenses. The burden of establishing a defense of double jeopardy is on the defendant. *U. S.* v. *Martinez,* 562 F.2d 633, 638 (10th Cir. 1977).

The observations of this court confirm that the most comprehensive test for determining whether or not conspiracies are the same offense for purposes of double jeopardy issues is the "totality of circumstances" test applied in some circuits. *U. S.* v. *Tercero,* 580 F.2d 312, 314-315 (8th Cir. 1978).

However, in this circuit, it is clear that the test for determining the "same offense" for conspiracies and substantive offenses is the "same evidence" test. *U. S.* v. *Martinez, supra.*

Considering all the pleadings, briefs, and portions of transcript of the Western District case filed herein (al-

though defendants did not file an entire transcript of the Western District proceedings), and applying the "same evidence" test of this circuit, the court concludes and finds that the defendants have not sustained their burden of proving that the offense in the Western District of Oklahoma and the offense charged herein are the same offense. This court finds, at this time, that the offenses are different offenses, and that these defendants are not being put in jeopardy a second time for the same offense in violation of the Fifth Amendment to the Constitution of the United States of America. However, this court will reconsider this issue in light of the full trial record of this case, upon proper application of the defendants.

Counsel should also be aware of the Department of Justice's policy concerning "duplicate" prosecutions as expressed in *Petite* v. *U. S.*, 361 U.S. 529 (1960), and *Rinaldi* v. *U. S.*, 434 U.S. 22 (1977). See also, *U. S.* v. *Guido*, 597 F.2d 194, 198 (9th Cir. 1979).

Accordingly, the motions to dismiss on grounds of double jeopardy of the defendants, Wilkett, Conklin and Hoover, are denied.

It is so ordered this *10th* day of March, 1981.

(s) *Frank H. Seay*
United States District Judge

[APPENDIX]

[Filed Dec. 17, 1980, in U. S. District Court]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. CR-80-147-T
HAROLD DEAN BEHRENS, et al., Defendants.	)	

ORDER

Defendants Hoover and Conklin have moved for dismissal, severance, and/or judgments of acquittal and have filed a joint brief in support of their motion. The Court heard argument on the motion Thursday, December 11, 1980, which was the third day of trial. Defendants Hoover and Conklin assert that the evidence is not sufficient to show their membership in the conspiracy charged, that a prejudicial variance of the proof from the indictment has occurred, and that venue is improperly laid in this district.

An essential element in the proof of a conspiracy is that a defendant must have knowledge of the conspiracy and its essential objective. Without knowledge of the conspiracy, it is not sufficient merely to show that a defendant furthered it, even through the commission of unlawful acts. *United States* v. *Alvarez*, 610 F.2d 1250 (5th Cir. 1980); *United States* v. *Conroy*, 589 F.2d 1258 (5th Cir. 1979), cert. denied 444 U.S. 831; *United States* v. *Watson*, 594 F.2d 1330 (10th Cir. 1979), cert. denied 444 U.S. 840; *United States* v. *Butler*, 494 F.2d 1246 (10th Cir. 1974). Here there is evidence to indicate that Dr. Conklin, James D. Wilkett and Hoover conspired to distribute Dilaudid in Stigler, Oklahoma, for the purpose of doping race horses. Thus there are two separate conspiracies here. Conklin and Hoover were members only one, their own, but there has been no

evidence presented that they had knowledge of the other involving the remaining defendants. The government has stated, as to both Conklin and Hoover, that it knows of no evidence which would prove that they had knowledge of the common goal or ultimate end of the conspiracy alleged against the remaining defendants, Behrens, Wilkett, Wilkett and Wee, as charged in the indictment. The government's only offer of proof in this regard is that on the basis of a doctor's testimony that the quantity of Dilaudid prescriptions written and filled was excessive, the jury could infer that Hoover and Conklin knew or should have known of the Behrens - Wilketts - Weed conspiracy. How the doctor — or the jury — would make the distinction between the two conspiracies on that basis is not shown. A conviction of Conklin and Hoover of the Oklahoma City conspiracy based upon this proof would be obtained "by piling inference upon inference," which is too remote to support a conviction. *Direct Sales Co.* v. *United States*, 319 U.S. 703, 711 (1943). Based upon the government's admitted absence of direct evidence of such required knowledge and viewing evidence it offers in the light most favorable to the government, the Court is compelled to the conclusion that while Hoover and Conklin may have been part of a conspiracy to violate the federal drug laws, they were not members of the conspiracy charged in the indictment against Behrens, Wilkett, Wilkett and Weed and are therefore entitled to a separate trial for reasons hereafter explained.

When, as here, a single conspiracy has been charged and the evidence shows the existence of two separate conspiracies, there are least two courses open to the Court. In *United States* v. *Butler*, supra, the Tenth Circuit outlined the possibilities; (1) the trial may continue against all defendants, with cautionary instructions to the jury regarding multiple conspiracies, or (2) when the prejudice to some defendants from the spill-over evidence or the possibility of guilt by association cannot be cured by cautionary instructions, the Court may require the government to elect

against which defendants it chooses to proceed and the remainder are severed for separate trial. In the circumstances of this case, the selection of either course mandates the same result. Having found that Hoover and Conklin are not members of the conspiracy charged against the remaining defendants, the Court cannot allow the jury to reach a verdict against them on a separate conspiracy, or allow the government to elect to proceed against them, because there is, by the government's own admission, no act or agreement upon which venue can be laid against Hoover or Conklin in the Western District of Oklahoma, without connecting them to the larger conspiracy. Any agreement of which they were a part, and any act in furtherance of such agreement, took place entirely within the Eastern District. Under the Sixth Amendment to the Constitution of the United States and Rule 18, Federal Rules of Criminal Procedure, venue lies in the district wherein the crime was committed. There being no venue in this district over the criminal acts charged against defendants Hoover and Conklin, as a matter of law the indictment against them here must be dismissed. These defendants are not acquitted, and they may be properly charged and tried in the Eastern District of Oklahoma where the alleged criminal acts occurred.

In accordance with the foregoing, the Court concludes and orders as follows: The motion for judgment of acquittal is denied. The Motion for Severance of Defendants Hoover and Conklin is granted, and the indictment against these two defendants is dismissed for lack of venue.

IT IS SO ORDERED this 17 day of December, 1980.

(s) *Ralph G. Thompson*
UNITED STATES DISTRICT JUDGE

[Filed Nov. 5, 1980 in U. S. District Court]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	
HAROLD DEAN BEHRENS,	)	
JAMES D. WILKETT, SR.,	)	No. CR-80-147-T
JAMES WILKETT, JR.,	)	
FRED WEED,	)	
THOMAS H. CONKLIN, JR., D.O.,	)	
JOE HOOVER, R.Ph., and	)	
HARVEY LEE MIZE, Defendants.	)	

ORDER

Defendants James D. Wilkett, Sr., James D. Wilkett, Jr., Thomas H. Conklin, Jr., D.O., Joe Hoover, R.Ph., and Harvey Lee Mize, have filed several pretrial motions, to which the Government has responded, and in consideration of which the Court rules as follows:

MOTION TO DISMISS

Defendants move for dismissal of the indictment, arguing that its allegations are too vague to apprise the defendants of the charges against them, and do not fully, directly or with certainty set forth all of the essential elements of the offense charged. The Court has examined the indictment, which is a one count indictment charging a conspiracy under 21 U.S.C. § 846. The indictment informs the defendants of the essential facts and the offense charged so as to enable them to prepare a defense and protect against another prosecution for the same offense. It is thus sufficient. *Harris* v. *Illinois*, 457 F.2d 191 (7th Cir. 1972), cert. denied, 409 U.S. 860. The indictment is sufficient and defendants' motion to dismiss is denied.

[APPENDIX]

MOTION TO DISMISS INDICTMENT FOR WANT OF PROPER VENUE

Defendants allege that the indictment must be dismissed as there is no venue within this district. The indictment charges a conspiracy "in the Western District of Oklahoma, the Eastern District of Oklahoma, and elsewhere . . ." The means and methods by which the defendants carried out the conspiracy are alleged in the indictment, and none of the means and methods listed occurred within the Western District of Oklahoma. However, an indictment alleging a violation of 21 U.S.C. § 846 is not required to allege any specific overt acts in furtherance of the conspiracy. *United States* v. *Bermudes,* 526 F. 89 (2nd Cir. 1975), cert. denied 425 U.S. 970; *United States* v. *King,* 521 F.2d 61 (10th Cir. 1975). The fact that the Government has chosen to allege overt acts in the indictment herein does not require dismissal simply because none of the overt acts alleged took place in this district. For purposes of establishing venue and jurisdiction, the Government may rely on overt acts not alleged in the indictment. *United States* v. *Schwartz,* 535 F.2d 160 (2nd Cir. 1976), cert. denied 430 U.S. 906, reh. denied 430 U.S. 976; *United States* v. *Downing,* 51 F.2d 1030 (2nd Cir. 1931). The indictment alleges that the defendants conspired in the Western District of Oklahoma, and that is, at this point, sufficient. If the Government should fail to prove that the conspiracy was formed or that one or more overt acts were committed within this district, defendants may reurge their motion. The motion is, at this time, however, denied.

MOTION FOR BILL OF PARTICULARS

Defendants move, pursuant to Rule 7(f), Federal Rules of Cirminal Procedure, for a bill of particulars, asking for several items of specific information. As stated above, the Court has concluded that the indictment is sufficient to inform defendants of the nature of the crime with which they are charged. Further, the indictment is sufficient to

assist the defendants in the preparation of their defense, and will not subject them to undue surprise at trial. The Government is not required to disclose the minutia of its evidence on a bill of particulars. *Cefalu* v. *United States*, 234 F.2d 522 (10th Cir. 1956). The indictment is sufficient, and defendants' motion for bill of particulars is denied.

MOTION TO PERMIT INSPECTION OF GRAND JURY MINUTES AND TRANSCRIPT OF TESTIMONY OF WITNESSES

Without objection from the Government, defendants will be permitted to inspect the grand jury minutes. However, as to grand jury testimony, defendants are required to show a particularized need for the pretrial disclosure of grand jury testimony. *Dennis* v. *United States*, 384 U.S. 855 (1966). The particularized need alleged by defendants is a need of such testimony for use in cross-examination of witnesses at trial, to impeach witnesses, refresh their recollection, or test their credibility. Disclosure pursuant to the Jencks Act will satisfy all these needs, and pretrial disclosure is not required. Defendants further assert a particularized need for the purpose of showing lack of evidence on which to base the indictment. The Court will not look behind the indictment to determine the adequacy or competency of the evidence upon which it was based. *United States* v. *Kysar*, 459 F.2d 422 (10th Cir. 1972). Therefore, defendants have failed to show a particularized need for grand jury testimony, and this portion of the motion is denied.

MOTION FOR DISCLOSURE OF EXCULPATORY MATERIAL AND INFORMATION

Defendants in this motion make a broad and sweeping request for any information which tends to exculpate, may lead to exculpatory evidence, or which may become beneficial to any of the defendants. Such request is far too broad, and will not be granted. Defendants are entitled to

pretrial discovery of information which is exculpatory, either through indication of innocence, mitigation of punishment in the event of conviction, or material which may substantially impeach the credibility of key Government witnesses. *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Giles* v. *Maryland*, 386 U.S. 66 (1967). *Brady* does not require the Government to open its files and assist in the defense. *Moore* v. *Illinois*, 408 U.S. 786 (1972). Defendants' motion to produce exculpatory evidence is granted, to the extent required by *Brady*, and the Government is under a continuing duty to disclose any such information. Defendants' request in remaining part is denied.

MOTION FOR CHANGE OF VENUE FOR REASON OF PREJUDICIAL PRETRIAL PUBLICITY

Moving defendants assert that the inflammatory publicity attendent to the filing of state charges against co-defendant Behrens, as well as prejudicial publicity surrounding charges and allegations against the Oklahoma City Police Department, require a change of venue. Rule 21(a), Federal Rules of Criminal Procedure. The Court is able to insure the defendant an unbiased jury, through a complete and careful void dire examination, with particular attention to exposure to or prejudice from publicity. The motion for change of venue is therefore denied.

MOTION FOR SEVERANCE

Defendants move for severance from co-defendants Behrens and Weed, both former officers of the Oklahoma City Police Department, alleging the same prejudicial publicity noted above. The burden is upon the moving parties to establish prejudicial joinder. *United States* v. *Jorgenson*, 451 F.2d 516 (10th Cir. 1971), cert. denied 405 U.S. 922. In order to obtain a severance, the defendants must show clear prejudice resulting from joinder at trial. *United States* v. *Bridwell*, 583 F.2d 1135 (10th Cir. 1978). As noted above, the Court can insure a fair and impartial jury through

careful and complete void dire questions. No party has raised the issue of the admissibility of any evidence or the property of any reference at trial relating to co-defendant Behrens pending state murder charge. A comment on the admissibility or propriety of such evidence or reference would therefore be inappropriate at this time. However, the Court can insure that, if and when the issue is raised, such references or evidence are either prohibited, or, if allowed, are accompanied by a careful limiting instruction to the jury, so as to prevent any prejudice to the moving defendants. Their motion for severance is therefore denied.

CONCLUSION

In accordance with the foregoing, the Court rules as follows on the motions of defendants Wilkett, Sr., Wilkett, Jr., Conklin, Hoover, and Mize: The motion to dismiss indictment is denied; motion to dismiss indictment for want of proper venue is denied; motion for bill of particulars is denied; motion to permit inspection of grand jury minutes and transcript of testimony of witnesses is granted as to minutes, denied as to the transcript of testimony; motion for disclosure of exculpatory material and information is denied in part and granted in part; motion for change of venue for reason of prejudicial pretrial publicity is denied; motion for severance is denied.

IT IS SO ORDERED this 5 day of *November*, 1980.

(s) *Ralph G. Thompson*
UNITED STATES DISTRICT JUDGE

Opposition

FILED
DEC 9 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-483

In the Supreme Court of the United States

OCTOBER TERM, 1981

THOMAS H. CONKLIN, JR. AND
JOE D. HOOVER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars reprosecution of a defendant after the court, at the defendant's request, dismissed the indictment during trial for lack of venue.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Abney v. *United States*, 431 U.S. 651 4

Arizona v. *Washington*, 434 U.S. 497 8

Ashe v. *Swenson*, 397 U.S. 436 8

Burks v. *United States*, 437 U.S. 1 ..... 4, 7

Carbo v. *United States*, 314 F. 2d 718, cert. denied, 377 U.S. 953 ..... 5, 6

Hanson v. *United States*, 285 F. 2d 27 6

Hayes v. *United States*, 296 F. 2d 657, cert. denied, 369 U.S. 867 5-6

Hyde v. *United States*, 225 U.S. 347 8

Lee v. *United States*, 432 U.S. 23 ..... 5, 7, 8

Mullaney v. *Wilbur*, 421 U.S. 684 6

Nielsen, In re, 131 U.S. 176 8

Travis v. *United States*, 364 U.S. 631 5

United States v. *Barnard*, 490 F. 2d 907, cert. denied, 416 U.S. 959 9

United States v. *Black Cloud*, 590 F. 2d 270 6

Page

Cases—Continued:

United States v. *Cooper*, 606 F. 2d 96, cert. denied, 444 U.S. 1024 9

United States v. *Cores*, 356 U.S. 405 5

United States v. *Costello*, 381 F. 2d 698 ..... 5, 6

United States v. *Dryden*, 423 F. 2d 1175, cert. denied, 398 U.S. 950 6

United States v. *Haley*, 500 F. 2d 302 6

United States v. *Lisowsky*, 504 F. 2d 1268 6

United States v. *Luton*, 486 F. 2d 1021 6

United States v. *Martin Linen Supply Co.*, 430 U.S. 564 5

United States v. *Martino*, 648 F. 2d 367 6

United States v. *Panebianco*, 543 F. 2d 447, cert. denied, 429 U.S. 1103 6

United States v. *Petersen*, 611 F. 2d 1313, cert. denied, 447 U.S. 905 8

United States v. *Powell*, 498 F. 2d 890, cert. denied, 419 U.S. 866 6

United States v. *Scott*, 437 U.S. 82 ..... 4, 5, 6

United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 8

United States v. *Stratton*, 649 F. 2d 1066 7

Winship, In re, 397 U.S. 358 6

Page

Constitution and statute:

United States Constitution, Fifth Amendment, Double Jeopardy Clause 4, 5, 7, 8

21 U.S.C. 846 ..... 1, 4

Miscellaneous:

Comment, *Twice In Jeopardy*, 75 Yale L. J. 262 (1965) 8

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-18a) is reported at 655 F. 2d 1007.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1981. A petition for rehearing was denied on July 21, 1981 (Pet. App. 18a). The petition for a writ of certiorari was filed on September 8, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In an indictment filed in the United States District Court for the Western District of Oklahoma, petitioners, together with James D. Wilkett and others, were charged with conspiracy to distribute Dilaudid, in violation of 21 U.S.C. 846. Prior to trial, petitioners moved to dismiss the indictment

for lack of venue. The district court denied the motion without prejudice (Pet. App. 26a), concluding that the indictment—which alleged a conspiracy in the Western and Eastern Districts of Oklahoma and elsewhere—was sufficient on its face.

The government's evidence at trial showed that petitioner Conklin, a physician, and petitioner Hoover, a pharmacist, wrote and filled Dilaudid prescriptions in the names of various individuals on behalf of co-defendant Wilkett (Tr. 494-539). These activities occurred at places within the Eastern District of Oklahoma. Wilkett then collected the Dilaudid tablets and sold them to others, who distributed the drug for human consumption in Oklahoma City, in the Western District of Oklahoma (Tr. 273-312). A DEA agent testified that petitioners had admitted that they wrote and filled the prescriptions for Wilkett knowing that there was no legitimate medical need for the drug. However, petitioners had claimed that they believed Wilkett was using the drug on race horses at a track located in the Eastern District of Oklahoma (Tr. 494-539).

After this evidence was presented, petitioners moved for dismissal of the indictment, severance of their case from that of the co-defendants, and for judgments of acquittal (Pet. App. 22a). In their brief in support of these motions, petitioners argued that the government had failed to establish their participation in the single conspiracy charged in the indictment. They asserted that, contrary to the allegations in the indictment, the evidence did not show that petitioners had conspired with Wilkett to distribute Dilaudid in Oklahoma City. Instead, petitioners claimed, the government's evidence demonstrated only that they had unlawfully agreed to supply Wilkett with Dilaudid for use on race horses in the Eastern District of Oklahoma.

The district court granted petitioners' motions for severance and dismissal, but denied their motion for judgments of acquittal (Pet. App. 22a-24a). The court agreed with petitioners that the evidence established the existence of two separate conspiracies and the participation of petitioners in only one of them (*id.* at 22a-23a). The court ruled that "while [petitioners] may have been part of a conspiracy to violate the federal drug laws, they were not members of the conspiracy charged in the indictment * * * and are therefore entitled to a separate trial * * *" (*id.* at 23a). The court then concluded (*id.* at 24a):

> Having found that [petitioners] are not members of the conspiracy charged against the remaining defendants, the Court cannot allow the jury to reach a verdict against them on a separate conspiracy, or allow the government to elect to proceed against them, because there is, by the government's own admission, no act or agreement upon which venue can be laid against [petitioners] in the Western District of Oklahoma, without connecting them to the larger conspiracy. Any agreement of which they were a part, and any act in furtherance of such agreement, took place entirely within the Eastern District. Under the Sixth Amendment to the Constitution of the United States and Rule 18, Federal Rules of Criminal Procedure, venue lies in the district wherein the crime was committed. There being no venue in this district over the criminal acts charged against [petitioners], as a matter of law the indictment against them here must be dismissed. These defendants are not acquitted, and they may be properly charged and tried in the Eastern District of Oklahoma where the alleged criminal acts occurred.

Thereafter, petitioners were indicted in the Eastern District of Oklahoma, together with Wilkett (who had been convicted at the first trial), for conspiracy to distribute

Dilaudid, in violation of 21 U.S.C. 846. Petitioners moved to dismiss this indictment on double jeopardy grounds, contending that they had previously been "acquitted" of the same offense in the Western District of Oklahoma. The district court denied their motion (Pet. App. 19a-21a).

On petitioners' appeal (see *Abney* v. *United States*, 431 U.S. 651 (1977)), the court of appeals affirmed (Pet. App. 2a-18a).[1] Relying on *United States* v. *Scott*, 437 U.S. 82 (1978), the court held that the Double Jeopardy Clause does not bar petitioners' retrial because petitioners themselves brought about the termination of the proceedings on a basis other than an adjudication of guilt or innocence (Pet. App. 8a-11a).

ARGUMENT

Relying on *Burks* v. *United States*, 437 U.S. 1 (1978), petitioners contend that the pre-verdict termination of their trial in the Western District of Oklahoma on grounds of improper venue constituted an "acquittal" for double jeopardy purposes and that, accordingly, they may not be retried in the Eastern District of Oklahoma for conspiracy to dispense Dilaudid. As the court of appeals correctly concluded (Pet. App. 10a-11a), however, the mid-trial dismissal of the original indictment for lack of proper venue was conceptually akin to the mid-trial dismissal for preindictment delay in *United States* v. *Scott*, 437 U.S. 82

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[1]The district court also had denied co-defendant Wilkett's motion to dismiss the Eastern District indictment. The court of appeals reversed the district court's denial of Wilkett's motion, however, on the ground that the first indictment in the Western District included Wilkett's activities in the Eastern District, and therefore his reprosecution in the Eastern District was barred by the Double Jeopardy Clause (Pet. App. 12a-18a). We have not sought review of that decision.

(1978).[2] Accordingly, the Double Jeopardy Clause affords no benefit to petitioners, who sought to terminate their trial without submission of the question of guilt or innocence to the trier of fact.

As this Court has observed, a pre-verdict termination of a criminal trial will be regarded as an "acquittal" only when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." *United States* v. *Scott, supra,* 437 U.S. at 97, quoting *United States* v. *Martin Linen Supply Co.,* 430 U.S. 564, 571 (1977). Moreover, the critical inquiry is whether the court's order "contemplates an end to all prosecution of the defendant for the offense charged." *Lee* v. *United States,* 432 U.S. 23, 30-31 (1977). Nothing in the district court's dismissal order resolved the question of factual and legal guilt or contemplated that all proceedings against petitioners would end.

By its very nature, venue is "a question of procedure" (Pet. App. 9a). It is a constitutional and statutory safeguard designed to protect an accused from trial in a jurisdiction remote from that in which the crime was committed. See *Travis* v. *United States,* 364 U.S. 631 (1961); *United States* v. *Cores,* 356 U.S. 405 (1958). Like other procedural safeguards founded on the Constitution, venue may be explicitly waived (*United States* v. *Costello,* 381 F. 2d 698, 701 (2d Cir. 1967); *Carbo* v. *United States,* 314 F. 2d 718, 733 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964); *Hayes* v.

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[2]There is no merit to petitioners' claim (Pet. 11) that *Scott* is inapposite because here, unlike in *Scott,* the government did not appeal the order dismissing the indictment. Regardless whether the government's response to the dismissal order is an appeal or the bringing of a new indictment, the basic double jeopardy question is the same: may a defendant be retried where the district court had dismissed an indictment after jeopardy attached in a previous trial?

United States, 296 F. 2d 657, 667 (8th Cir. 1961), cert. denied, 369 U.S. 867 (1962)), and, unlike some other rights, waiver of a venue claim may be implied by a simple failure to interpose a timely objection. *United States* v. *Black Cloud*, 590 F. 2d 270, 272 (8th Cir. 1979); *United States* v. *Dryden*, 423 F. 2d 1175, 1178 (5th Cir.), cert. denied, 398 U.S. 950 (1970); *United States* v. *Costello*, *supra*, 381 F. 2d at 701; *Hanson* v. *United States*, 285 F. 2d 27, 28 (9th Cir. 1960). Although venue must be established as a procedural predicate in every case, it need not be pleaded in the indictment (*Carbo* v. *United States*, *supra*, 314 F. 2d at 733), and it need only be proved by a preponderance of the evidence. See, *e.g.*, *United States* v. *Martino*, 648 F. 2d 367, 400 (5th Cir. 1981); *United States* v. *Panebianco*, 543 F. 2d 447, 455 (2d Cir. 1976), cert. denied, 429 U.S. 1103 (1977); *United States* v. *Lisowsky*, 504 F. 2d 1268, 1273 (7th Cir. 1974); *United States* v. *Luton*, 486 F. 2d 1021, 1023 (5th Cir. 1973); *United States* v. *Haley*, 500 F. 2d 302, 305 (8th Cir. 1974); *United States* v. *Powell*, 498 F. 2d 890, 891-892 (9th Cir.), cert. denied, 419 U.S. 866 (1974). Thus, venue stands on quite different footing from those "essential elements" of an offense which the government must prove beyond a reasonable doubt in order to establish a defendant's guilt (*Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358, 361-364 (1970)). See *United States* v. *Powell*, *supra*, 498 F. 2d at 891; *Carbo* v. *United States*, *supra*, 314 F. 2d at 733.

When an indictment is dismissed for lack of venue, it is for a reason "required by the Constitution" that is "unrelated to factual guilt or innocence." *United States* v. *Scott*, *supra*, 437 U.S. at 98 n.11. Such a ruling merely "represents a legal judgment that a defendant, although criminally culpable, may not be punished" because the government instituted proceedings in the wrong forum. *Id.* at 98. In this respect, a dismissal for lack of venue is not meaningfully different from a dismissal because an information failed to

charge a necessary element of the offense (see *Lee* v. *United States, supra*, 432 U.S. at 30-31), or a reversal of a conviction because of some defect in the trial itself, such as improper instructions or erroneously received evidence. See *Burks* v. *United States, supra*, 437 U.S. at 15.[3]

Here, the trial court expressly found (Pet. App. 22a) that the evidence was sufficient to show that petitioners had conspired to dispense controlled substances. The court dismissed the indictment at petitioners' behest for a reason wholly independent of petitioners' culpability. Moreover, the court clearly contemplated that the government would reinstitute the prosecution in the correct forum (*id.* at 24a). Thus, unlike in *Burks*, the court's action here "implie[d] nothing with respect to the guilt or innocence" of petitioners (437 U.S. at 15).[4]

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[3]Petitioners fail to cite a single case holding that retrial is barred following reversal of a defendant's conviction for lack of venue. We note that in *United States* v. *Stratton*, 649 F. 2d 1066 (5th Cir. 1981), the court reversed and remanded for a new trial on the ground that the district court had improperly ordered a change in venue without obtaining the consent of all of the defendants. *Stratton* thus reinforces our submission that venue is a procedural requirement and that, barring prosecutorial overreaching (see note 5, *infra*), a retrial may be held in order to correct an error at the first trial with regard to venue.

[4]The trial court's determination that there was a prejudicial variance between the single conspiracy charged in the original indictment and the evidence that showed the existence of two separate conspiracies does not preclude retrial of petitioners. Assuming arguendo that the district court was correct in finding multiple conspiracies, there existed a conspiracy among Wilkett and his subordinates, in which petitioners were not involved, to distribute Dilaudid in the Western District of Oklahoma, and a conspiracy by petitioners to dispense Dilaudid to Wilketts in the Eastern District of Oklahoma. While the Double Jeopardy Clause would in this view prevent petitioners from ever being tried again for the Western District distribution conspiracy, the court's determination that the government had failed to prove that petitioners participated in that conspiracy did not constitute an acquittal on the Eastern District conspiracy charged in the instant case. Thus, petitioners may be retried because the instant case does not involve the "same

The petition in this case raises a novel issue that was correctly decided by the court of appeals. Petitioners do not contend that the issue is one that is likely to recur with any frequency, or that the decision below conflicts with the decision of any other court of appeals. In these circumstances, review by this Court is unwarranted.[5]

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offense" or relitigation of factual issues already resolved favorably to petitioners at the first trial. See *Ashe* v. *Swenson*, 397 U.S. 436 (1970); *In re Nielsen*, 131 U.S. 176 (1889). The finding of the court of appeals that Wilkett could not be retried for the Eastern District conspiracy with petitioners is not inconsistent with this analysis. As the hub figure of a "hub and spoke" conspiracy, Wilkett could have been charged either with two separate conspiracies or with the one larger conspiracy that was in fact charged, without being able to show prejudice requiring severance of the conspiracies. Since the government elected to charge him with a single conspiracy embracing both the acquisition of the drugs in the Eastern District and their distribution in the Western District, his conviction barred reprosecution for the acquisition agreement already proved against him as part of the offense charged in the Western District.

[5]There is no merit to petitioners' suggestion (Pet. 10-11) that the decision below will enable prosecutors to manipulate the charges against a defendant so as to strengthen the government's case and increase the likelihood of conviction on retrial. While the Double Jeopardy Clause forbids a " 'prosecutor [from using a] first proceeding as a trial run of his case' " (*Arizona* v. *Washington*, 434 U.S. 497, 508 n.24 (1978), quoting from Comment, *Twice In Jeopardy*, 75 Yale L. J. 262, 287-288 (1965)), petitioners do not accuse the prosecutor of such misconduct here, and the court of appeals correctly found that there was no evidence in the record of "any intentional effort to harass the defendants" (Pet. App. 8a). See *Lee* v. *United States*, *supra*, 432 U.S. at 33-34.

The indictment charged, and it was the government's theory of prosecution, that petitioners were involved in a single conspiracy, and that acts in furtherance of that conspiracy had occurred in both the Western and Eastern Districts of Oklahoma. Under this single conspiracy theory, venue was proper in the Western District, since it is well settled that a conspiracy offense may be prosecuted in the district in which the agreement was entered into as well as in any district where overt acts in furtherance of the conspiracy were committed. See, *e.g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 252-254 (1940); *Hyde* v. *United States*, 225 U.S. 347, 357-367 (1912); *United States* v. *Petersen*,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

MARGARET MILLER
Attorney

DECEMBER 1981

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611 F. 2d 1313, 1333 (10th Cir. 1979), cert. denied, 447 U.S. 905 (1980); *United States* v. *Cooper*, 606 F. 2d 96, 97 (5th Cir. 1979), cert. denied, 444 U.S. 1024 (1980); *United States* v. *Barnard*, 490 F. 2d 907, 909-910 (9th Cir. 1973), cert. denied, 416 U.S. 959 (1974). It is rather far-fetched to suppose that a prosecutor would intentionally charge a single conspiracy rather than two separate ones and would bring the charges in a district where venue is proper as to the single conspiracy but not as to one of the separate conspiracies in order to gain a tactical advantage over the accused.

Because venue was proper in the Western District of Oklahoma under the government's theory that only one conspiracy existed, the Court need not decide in this case whether retrial would be permissible where venue is clearly improper under any theory of the case and the district court dismisses the indictment in mid-trial for lack of venue after the government has been placed on notice of a defect in its case by a pretrial motion raising the venue issue.

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Petitioner's Reply Brief

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No. 81-483

In the Supreme Court of the United States

OCTOBER TERM, 1981

THOMAS H. CONKLIN, JR.
and JOE D. HOOVER,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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December, 1981

TABLE OF CONTENTS

	PAGE
ARGUMENT	1
CONCLUSION	8

CERTIFICATE OF SERVICE follows Brief.

TABLE OF AUTHORITIES

Cases	PAGE(S)
Burks v. *United States*, 437 U.S. 1 (1978)	4, 6
Sanabria v. *United States*, 437 U.S. 54 (1978)	2
United States v. *Scott*, 437 U.S. 82 (1978)	6
U. S. Constitution	
Amendment VI	7
Statutes and Codes	
21 U.S.C. §846	1

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Respondent's brief in opposition simply does not meet the important Double Jeopardy Clause issues presented by the petition in this case.

A brief restatement of these issues so demonstrates.

Petitioners, together with James D. Wilkett, and others, were indicted in the United States District Court for the Western District of Oklahoma for conspiracy to distribute a controlled substance in violation of 21 U.S.C. §846.

Immediately after the return of the indictment, petitioners moved to dismiss for want of venue in the Western District of Oklahoma. Petitioner's pretrial brief fully stated

the reasons why venue *as to petitioners* could not lie in the Western District of Oklahoma. As the Court of Appeals below recognized, petitioners "from the start, advanced the proposition that the indictment in the Western District was improper on its face. . . ." Pet., App., p.6a.

The government, nevertheless, successfully insisted on forcing petitioners to stand trial in the Western District. The "legal consequences . . . [of that decision] flow from what has actually happened, not from what a party might have done from the vantage of hindsight." *Sanabria* v. *United States,* 437 U.S. 54, 65-66 (1978). Thus, the issue which respondent treats as a hypothetical in the last paragraph of footnote 5 (p.9) of its brief is *not* hypothetical — it is the question to be decided.

The District Court in the Western District declined to dismiss the indictment against petitioners for want of venue prior to trial, although the District Court expressly noted that nothing in the indictment demonstrated venue, and that, if the government was unable to prove venue, the matter would be reconsidered. Pet., App., p.26a.

So, as stated, the government's suggestion (Brief, p.9, n.5) that

> ". . . the Court need not decide in this case whether retrial would be permissible where venue is clearly improper under any theory of the case and the district court dismisses the indictment in mid-trial for lack of venue after the government has been placed on notice of a defect in its case by a pretrial motion raising the venue issue . . ."

is simply not correct. That is exactly the question which must be confronted. *Sanabria, supra.*

The government was "placed on notice of the defect in its case" by a timely, vigorously argued pretrial motion, and by the decision of the District Court for the Western District which clearly warned the government that the indictment, as it read, contained nothing which would support venue in the Western District as to petitioners.

At the close of the government's evidence, the District Court held that the government had introduced *no evidence whatsoever* which could support an inference of venue in the Western District of Oklahoma as to petitioners. Therefore, the District Court held, there was a fatal insufficiency in the government's proof which prevented the District Court from submitting the government's case against petitioners to the jury, and dismissed the indictment against petitioners. Pet., App., pp.22a-24a.

The District Court submitted the government's case against the remaining defendants, including Mr. Wilkett, to the jury. The remaining defendants were convicted. Thereafter, the government returned an indictment in the Eastern District of Oklahoma, identical in all substantive respects, to the indictment returned in the Western District of Oklahoma against petitioners *and Mr. Wilkett.*

All defendants moved to dismiss the second indictment on grounds of former jeopardy. The District Court for the Eastern District of Oklahoma denied each of the three motions on identical grounds.

Each of the three defendants appealed.

The Court of Appeals in a bifurcated decision, *reversed* the District Court as to Mr. Wilkett. The Court of Appeals held that, since the government had introduced all

the evidence which it had against Mr. Wilkett in the prosecution in the Western District, a new, identical prosecution in the Eastern District was barred by the Double Jeopardy Clause. Pet., App., pp.12a-18a. As the government states, it has not sought review of the decision sustaining Mr. Wilkett's plea of double jeopardy. (Brief, p.4, n.1).

At the same time, however, the court below *affirmed* the decision of the district court as to petitioners. The court did so although the position of petitioners and of Mr. Wilkett is identical in all relevant respects. As the court below conceded, the government introduced all the evidence it had as to *all* defendants in the first trial. Pet. App., p.14a.

The bifurcated decision below is obviously untenable. If, as the Court of Appeals held, Mr. Wilkett's plea of double jeopardy was well taken, petitioners' pleas of double jeopardy are *a fortiori* well taken since the government, in the previous prosecution of petitioners in the Western District of Oklahoma, was, by its own admission, unable to adduce *any* evidence of a constitutionally essential factual element of the government's case: the existence of venue. A finding of such evidentiary insufficiency is a bar to retrial. *Burks* v. *United States*, 437 U.S. 1 (1978).

Respondent articulates no principle suggesting otherwise.

Respondent's discomfort with its own position is evident throughout its brief. Respondent is unable to suggest any plausible justification for the holding of the Court of Appeals that retrial of Mr. Wilkett is barred by the Double Jeopardy Clause but that retrial of petitioners is not. There simply is no justification for such a result.

Respondent's strained attempt to transmute the holding of the District Court for the Western District from one of complete evidentiary insufficiency in the government's case on the constitutionally critical factual issue of venue into a hypothetical discussion of "variance" (Brief, pp.7-9, nn.4-5) is imaginative but untenable.

Respondent's assertion (Brief, p.7, n.4) that, under the decision below, the Double Jeopardy Clause *would* bar retrial of petitioners in the *Western* District of Oklahoma, but would not bar retrial in the *Eastern* District of Oklahoma is simply without merit. As the Court of Appeals recognized, the two indictments are identical in all relevant respects and the government has conceded in both courts below, that, if a retrial is allowed, it will use the same evidence which it used in the previous prosecution. Pet., App., pp. 15a-18a. Thus, the express holding of the Court of Appeals clearly negates respondent's suggestion that the Eastern District indictment does not involve the "same offense" as that charged and tried in the Western District (Brief, pp. 7-8, n.4). It does. Indeed, that is *precisely* the ground upon which the Court of Appeals *sustained* Mr. Wilkett's plea of former jeopardy. Obviously, the same result must follow as to petitioners. In any event, at least in the absence of a cross-petition presenting the question of whether the Court of Appeals was in error in sustaining Mr. Wilkett's plea of double jeopardy, the "same offense" argument is simply not open to respondent in this Court. The Court of Appeals rejected it and that ends the matter on the record here presented.

It is apparent from the strained "distinctions" in footnotes 4 and 5 of its brief that respondent is fully aware of the fatal inconsistency in its current position.

Respondent's assertion that *United States* v. *Scott*, 437 U.S. 82 (1978), rather than *Burks* v. *United States*, 437 U.S. 1 (1978), is the controlling precedent here is marked by equally strained assertions.

Contrary to respondent's suggestion (Brief, p.4) this case is not "conceptually akin" to *Scott*. This is so for a multitude of reasons of which only two need now be mentioned. *Scott* involved the defense of prejudicial preindictment delay. This defense presents a question of law for the trial court to adjudicate. We are unaware of any authority for the proposition that a legal defense such as prejudicial preindictment delay can ever be submitted to a jury for its decision. By contrast, the existence of venue is a question of fact which, if the government has sufficient evidence, is always submitted to the jury because it is a constitutionally essential *factual* element of the government's case. But if, as in this case, the government's evidence is so woefully lacking that the case cannot even be *submitted* to the jury, *Burks* clearly bars retrial. *Burks*, *supra*, 437 U.S. 1, 10-11; 16-18.

Neither the court below nor respondent here suggests how *Burks* can be rendered inapplicable by labeling the unproven fact a "procedural" fact. No authority exists to support such a notion.

Moreover, it is fundamental that a purely legal defense such as prejudicial preindictment delay is an "affirmative defense" to be asserted and proven by the defendant.

The existence of venue, by contrast, is an essential part of the government's case-in-chief in all federal criminal prosecutions. The Sixth Amendment makes it so by its very words. Respondent concedes as much (Brief, p.6). And the fact that the government's burden of proof as to the existence of venue is held to be less than that required as to other essential elements of the government's case (Brief, p.6) is all the more reason why *Burks does* control this case.

The government agrees that, "[t]he petition in this case raises a novel issue" (Brief, p.8) of Double Jeopardy Clause jurisprudence.

The issue is "novel" because the holding below is absolutely unprecedented. It is also plainly wrong.

Respondent is unable to articulate *any* conceivable rationale for upholding the decision below, at least in the absence of a cross-petition raising the question of whether the Court of Appeals was correct in sustaining the plea of double jeopardy interposed by petitioners' co-defendant, Mr. Wilkett.

Under these circumstances, it is clear that the Court should grant review to rectify an egregiously erroneous decision and completely untenable precedent. Indeed, we submit that summary reversal may well be in order.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December, 1981

CERTIFICATE OF MAILING

This is to certify that the undersigned, a member of the Bar of the Supreme Court of the United States, has mailed three (3) copies of the foregoing Reply Brief in Support of Petition for Writ of Certiorari in conformity with Rule 28 of the Supreme Court Rules to:

The Honorable Rex E. Lee
Solicitor General
Office of the Solicitor General
Department of Justice
Washington, D.C. 20530

this _____ day of December, 1981, by certified mail, with postage fully prepaid thereon, and to further certify that all parties required to be served have been served.

Bernard J. Rothbaum, Jr.